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# In The Supreme Court of the United States

October Term, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

*Petitioner,*

vs.

KENT L. BARWICK, et al.,

*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS*

## BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND THE NEW YORK BOARD OF RABBIS AS AMICI CURIAE

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## INTEREST OF AMICI CURIAE

The organizations listed below as joining in this brief are national and local organizations of Jewish rabbis and scholars, as well as synagogues and temples which represent the broad spectrum of Jewish religious and communal life in the United States.

The Synagogue Council of America is a coordinating body composed of the Central Conference of American Rabbis, Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America and United Synagogues of America. The Central Conference of American Rabbis, the largest Reform Jewish Rabbinical organization in the world, is intimately involved in a panoply of issues implicating moral, ethical and religious

values. The Rabbinical Assembly, the largest Conservative Jewish Rabbinical organization in the world, is intimately involved with educational, social and legal issues which are significant to the Jewish community. The Rabbinical Council of America, the largest Orthodox Jewish rabbinical organization in the world, is deeply involved in issues relating to social justice and religious freedom. The Union of American Hebrew Congregations, a coordinating body for approximately 820 Reform congregations in the United States, is intimately involved in advancing religious liberty and social freedom. The Union of Orthodox Jewish Congregations of America, a coordinating body for approximately 1,000 Orthodox Jewish congregations in the United States, is dedicated to working for social justice and religious freedom. The United Synagogues of America, a coordinating body for approximately 800 Conservative Jewish congregations, is intimately involved in matter of social and religious significance to the Jewish community.

The six national organizations listed above, each with a unique perspective and outlook, have joined together through the Synagogue Council of America to speak with one voice on issues which are of national significance, have a profound effect on the Jewish community or impair or impinge upon the religious liberties or moral values of any group.

The New York Board of Rabbis, the largest rabbinic organization in the world, with a membership comprised of Orthodox, Conservative and Reform rabbis, is dedicated to social progress and religious freedom. The Board of Rabbis is a principal expositor of the views of the rabbinate of the New York metropolitan area as well as the rabbinate of the State of New York.

These national rabbinic and congregational organizations acting through the Synagogue Council of America, together with the metropolitan New York rabbinate speaking through the New York Board of Rabbis, submit this brief as friends of the Court because this case involves issues of deep and overriding concern to people of all faiths and to the Jewish community in particular. This case presents for adjudication whether the state's police power to protect aesthetic values is of such compelling weight as to subordinate the basic rights of a religious congregation to worship where it sees fit and in the type of structure it deems appropriate. Resolving whether these basic rights fall within the ambit of activity protected by the Free Exercise Clause of the First Amendment is of particular interest to Amici. The New York City Landmarks Preservation Law and similar laws enacted by other states and localities present potentially serious restrictions on a congregation's use of its church or synagogue in the manner best suited to carrying out the congregation's religious goals. Amici respectfully submit that permitting the state to restrict the manner in which a congregation may use its termon based solely upon aesthetic considerations is at variance with established principles of constitutional jurisprudence which mandates accomodation of religious free exercise. *Lynch v. Donnelly,* 465 U.S. 668, (1984). *See also Zorach v. Clauson,* 343 U.S. 306 (1952).

This brief is submitted with the written consent of the parties.

## STATEMENT

The Church of St. Paul and St. Andrew, constructed in 1897, is located on a 150-foot by 125-foot plot at the corner of West End Avenue and 86th Street in New York City. The passing years have not been kind to the Church or the congregation. The Church building has deteriorated structurally and Church membership once 1400 has dwindled to approximately 250.

Confronted with the structural decay of the Church building, the congregation, long-active in numerous social and communal programs, was forced to allocate the Church's sparse resources between preventing further deterioration of the Church edifice or fulfilling the primary mission of the Church—teaching, comforting and assisting its parishioners, the economically needy and the spiritually afflicted. Because of the congregation's priorities, little thought, if any, was given to allocating the Church's meager funds to reversing the deterioration of the Church structures and by 1982 the cost of these repairs was estimated at $350,000, approximately 6 times the Church's annual income in that year.[1] (Pet. App. at 92a).

Realizing that it lacked sufficient income to perform adequately its ministry while concurrently remedying the potential safety hazards and structural deficiencies in the Church building, the congregation, in 1975, appointed a committee to develop a plan that would provide a suitable

1. By 1984, the cost of repairs had risen to approximately $500,000; the Church's annual income remained the same (Pet. App. at 103a).

Church edifice while concomitantly affording the congregation with a source of income adequate to perform its ministry to the community. By 1980 the committee had developed a plan which called for demolition of the present Church structure, construction of a more efficient Church building on part of the site and construction of an income-producing residential tower on the remainder. By the time the plan was developed, however, the Church was the subject of landmark proceedings and the committee plan was never acted upon.

In January 1980, the Church membership was notified by the New York City Landmarks Preservation Commission that the Church was being considered for possible landmark designation. The congregation opposed the designation. The Church membership observed that landmark designation would require that the Church be maintained in accordance with applicable landmark regulations at a cost far in excess of the Church's resources. Since the congregation lacked the funds to comply with the regulations, landmark designation would result in the insolvency of the Church and its possible dissolution. The congregation's objections were rejected by the Landmarks Commission and the Church was designated a landmark in 1981. The Landmarks Commission's designation was approved by the New York City Board of Estimate on March 18, 1982.

The Church commenced this action in New York Supreme Court on June 23, 1982. The Church sought declaratory judgment that the New York City Landmarks Preservation Law was unconstitutional as applied to the Church and an injunction against any enforcement of the landmark designation. The Church asserted that landmark designation seriously interfered with the Church's religious and charitable functions because the Landmarks

Preservation Law imposed criminal sanctions on the Church for failure to perform immediate and on-going mandatory maintenance obligations. These strictures, the Church contended, foisted aesthetics over religious freedom in violation of the First Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment and constituted a "taking" of Church property without adequate compensation. Respondents moved for summary judgment asserting, among other grounds, that the action was not sufficiently ripe. Respondents noted that adequate remedies were available to the Church even if it were designated a landmark but these remedies could not be considered in conjunction with landmark designation. The New York Supreme Court while observing that the alternative remedies proposed by Respondents might result in the Church losing control over the reconstruction of its building nonetheless granted Respondent's motion. The New York Supreme Court's decision was affirmed by the Supreme Court, Appellate Division, without opinion, and by the New York Court of Appeals.

## DISCUSSION

The present case presents for adjudication an issue of paramount significance—does the state's police power to preserve exemplars of architecture outweigh First Amendment guarantees of religious liberty. In upholding the Church's landmark designation, the New York Court of Appeals gave the issue of infringement on the Church's free exercise rights short shrift, preferring instead to characterize the Church's opposition to landmark status as stemming from an "aversion to ceding control of the [Church] building program to the Commission." *Church of St. Paul and St. Andrew v. Barwick,* 67 NY 2d 510, 517 (1986). The Court of Appeals' unduly narrow approach

ignores established doctrines of First Amendment jurisprudence and is a chilling response to those who view working for the "greater glory of God" as mandating ministering to the needy rather than preserving stones and mortar.

The constitutional guarantees of religious liberty manifest in the First Amendment are the product of the Framers' abiding respect for religious values and their desire to create an atmosphere permeated with a spirit of religious accommodation in which those values could flourish. The spirit of friendship and assistance envisioned by the Framers is epitomized by the Court's statement in *Zorach v. Clauson,* 343 U.S. at 313-314.

> When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

To be sure, the Framers did not intend that religious freedoms contained in the Free Exercise Clause be absolute. It is unassailable that religious rights may be outweighed where compelling interests of health, safety or welfare are implicated. *See e.g., Reynolds v. United States,* 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts,* 321 U.S. 645 (1944) (child labor law); *State ex rel. Swann v. Pack,* 527 S.W. 2d 99, *cert. denied,* 424 U.S. 954 (1976) (church pastor precluded from "handling, displaying or exhibiting" poisonous snakes in a crowded church sanctuary where there were virtually no safeguards and children roamed unattended). This Court has

recognized, however, that fidelity to our national heritage, as well as incontrovertible constitutional principles preclude infringement on religious conduct absent a compelling governmental interest and requires accommodation of religious beliefs. As the Court stated in *Sherbert v. Verner,* "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" 374 U.S. 398, 406 (1963), *quoting Thomas v. Collins,* 323 U.S. 516, 530 (1945); *See also Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). The dispositive jurisprudential precept is that the Constitution "affirmatively mandates accommodation not merely tolerance, of all religions. . . ." *Lynch v. Donnelly,* 465 U.S. 668, (1984).

While the Landmarks Preservation Law is a noble attempt by the City of New York to preserve for future generations designated structures which are deemed by the Landmarks Commission to be paradigms of cultural, architectural, historical or social significance, it cannot be contended that aesthetic preservation rises to the level of a compelling state interest which justifies abridging religious liberties. Nor can it be fairly asserted that accommodating the Church's desire will unduly interfere with the rationale underlying the Landmarks Law or "radically restrict the operating latitude of the legislature." *United States v. Lee,* 455 U.S. 252, 259 (1982), *quoting Braunfeld v. Brown,* 366 U.S. 599, 606 (1961).

Accommodating the religious beliefs of the Church and exempting the Church buildings from the strictures of the Landmarks Law may well deprive New York City of a structure which the Landmarks Commission considered an examplar of the eclecticism that spread through American architecture in the late 19th Century, represen-

ting a fusion of Early Christian, German Romanesque and Italian Renaissance styles. The consequences of failing to accommodate the Church's religious beliefs, while more pleasing to the eye perhaps, are unquestionably profoundly more troubling to the soul. Vaunting aesthetics over religious freedom is not only at odds with our tradition but also produces a perverse result which the Free Exercise Clause was designed to avoid—the congregation will be presented with a Hobson's choice of risking criminal sanctions for failing adequately to maintain the Church in compliance with the strict requirements of the Landmarks Law (New York City Administrative Code §§207-10.0; 207-16.0) or abandoning or dissolving the Church.[2]

Landmarks preservation statutes have been adopted in all 50 states and over 500 municipalities. As this Court observed in *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), the New York City Landmarks Preservation Law is typical of many urban landmark laws. While *Penn Central* established the parameters of permissible state action with respect to the Fourteenth Amendment issue of "taking" without "just compensation" it does not, nor does any other decision of the Court, provide explicit guidance as to whether the

2. The axiological precepts of accommodation which underlie the Court's Free Exercise decisions render *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978), wholly beside the point. The issue here is not whether exercise of the state's police power to preserve and protect architectural exemplars constitutes a taking for which the owners have been adequately compensated. As the Court concluded in *Penn Central,* the state's exercise of police power is justified where it is predicated upon a rational basis and related to a colorable state interest. Existence of a rationale basis is insufficient where religious freedoms are implicated. *Sherbert v. Verner; supra; Wisconsin v. Yoder, supra.*

state's desire to preserve architectural aesthetics is a sufficiently compelling interest to overbear free exercise rights. Amici respectfully submit that religious liberty is a more significant societal interest.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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